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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

OSWALDO CUEVAS,

Defendant and Appellant.

B166385

(Los Angeles County
Super. Ct. No. BA225099)

APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Fahey, Judge. Affirmed.

Law Offices of James E. Blatt, James E. Blatt for Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Mary Sanchez, Supervising Deputy Attorney General for Respondent.

INTRODUCTION

A jury convicted defendant and appellant Oswaldo Cuevas (appellant) of two counts of first degree murder (Pen. Code § 187, subd. (a)¹); one count of attempted second degree robbery (§§ 664/211); and one count of second degree commercial burglary (§ 459). The jury also found true allegations that a principal was armed with a firearm in the commission of the offenses (§ 12022, subd. (a)(1)), and that appellant personally and intentionally used a firearm (§ 12022.5, subd. (a)(1); 12022.53, subds. (b) and (c)). The trial court sentenced appellant to life imprisonment without the possibility of parole, plus twenty years.

Appellant appeals his conviction, contending that there was insufficient evidence to establish that he had the requisite mental state for attempted robbery and burglary to sustain the felony murder conviction. Because substantial evidence supports the jury's findings in this case, we affirm the judgment.

BACKGROUND

On November 12, 2001, at approximately 5:30 p.m., Maite Luna and her husband were working at the store they owned, Rogers Minimart, located at 830 East Washington Boulevard in Los Angeles. A thin, young Hispanic male with a light complexion entered the store and looked at videos for rent in the store. Approximately ten minutes later, the young man asked Mrs. Luna whether she had any Super Nintendo games for sale, and Mrs. Luna said “no.” The young man exited the store but lingered outside the store entrance to browse through magazines on a display rack outside. Appellant was also standing outside the store, and the young man and appellant spoke together for five to ten minutes. Appellant and the young man then entered the store together. Appellant had his right hand in his pants pocket. The conduct of appellant and his companion made Mrs. Luna both suspicious and afraid, prompting her to go outside and use her cell phone to

¹ All references herein are to the Penal Code.

telephone her daughter. Mrs. Luna then saw appellant and his companion walk over to her husband. Appellant asked Mr. Luna for an Antonio Aguilar audio cassette tape. Mr. Luna handed appellant the cassette tape, appellant said he did not want it, and Mr. Luna returned the tape to the display case. Appellant's fingerprint was later recovered from the cassette tape.

Mrs. Luna then became occupied with assisting a female customer and ringing up the customer's purchase on the cash register. The only persons in the store at the time were Mrs. Luna, her husband, the female customer, appellant and appellant's companion. While assisting the female customer, Mrs. Luna heard a gunshot. She saw appellant run by, almost knocking down the female customer in the process. Mrs. Luna saw appellant's companion fall to the floor and say "I didn't do anything. I didn't do anything." The companion then got up and walked out of the store. Mrs. Luna went to her husband, who had fallen behind the counter. His eyes were closed, and he did not respond. Mr. Luna was taken to the hospital, where he later died of a gunshot wound to the head.

Jesus Abaunza, the owner of a one hour photo store located next door to the Rogers Minimart, was working in his store at the time of the crimes. He said that he heard three to four gunshots and a few seconds later saw a young Hispanic male exit the Rogers Minimart, holding a weapon. The young man fired two to three shots into the air, walked towards Griffith Avenue and turned right. Shortly thereafter, Mr. Abaunza saw a second young Hispanic male exit the Rogers Minimart. The second male was bent over, clutching his stomach, and also had a gun. Mr. Abaunza saw the second male walk in the same direction as the first Hispanic male.

Crystal Brown, a customer in Jesus Abaunza's one hour photo shop at the time of the crimes, said that she heard four gunshots in rapid succession and ran outside to see what happened. She saw a young Hispanic male exit the Rogers Minimart walking backwards and pointing a silver colored gun toward the store. A few seconds later, she

saw a second young Hispanic male exit the store, lift his sweatshirt up, and walk in the same direction as the first Hispanic male.

Officers responding to the scene found a young Hispanic male, later identified as Eduardo Lobeira, lying in an alley near the Rogers Minimart with a gunshot wound to the chest. Lobeira and appellant were friends. Lobeira subsequently died of the gunshot wound.

Responding officers recovered outside the Rogers Minimart one spent bullet and three empty .9 mm casings. Inside the market, officers recovered one spent bullet and a .38 revolver with four live rounds and one spent casing still inside the gun, later identified as belonging to Mr. Luna. The spent .9 mm casings were later determined to have been fired from the same gun. The recovered bullets came from two different guns.

Two weeks after the crimes, Mrs. Luna identified appellant from a photographic lineup consisting of six photographs. The following March, Mrs. Luna was unable to identify appellant from a live line up held in the county jail.

Following a trial, the jury convicted appellant of first degree murder; attempted second degree robbery; and second degree commercial burglary. The jury also found true allegations that a principal was armed with a firearm in the commission of the offenses, and that appellant personally and intentionally used a firearm. Appellant moved for a new trial, and following a hearing, the trial court denied the motion. The trial court sentenced appellant to life imprisonment without the possibility of parole, plus twenty years. Appellant filed this appeal.

DISCUSSION

A. Standard of Review

Appellant asserts that the evidence adduced at trial was insufficient to establish that he had the requisite mental state for burglary and attempted robbery to sustain his conviction of first degree felony murder. When assessing this claim, an appellate court reviews the entire record in the light most favorable to the prosecution to determine

whether it contains substantial evidence – that is, “evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Bolden* (2002) 29 Cal.4th 515, 553; *People v. Lewis* (2001) 25 Cal.4th 610, 642.) “““If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.””” (*People v. Bean* (1988) 46 Cal.3d 919, 933.) The standard of review is the same when the prosecution relies mainly on circumstantial evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396.)

B. Sufficiency of the Evidence

Liability for first degree murder based on a felony murder theory is proper when the defendant kills in the commission of a robbery, burglary or any of the other felonies enumerated in section 189. (*People v. Lewis, supra*, 25 Cal.4th at p. 642.) Attempted robbery and burglary are enumerated felonies under section 189. (Pen. Code § 189.) To find a defendant guilty of first degree murder based on killing during a robbery or attempted robbery, the evidence must show that the defendant intended to steal the victim’s property either before or during the fatal assault. (*People v. Lewis, supra*, 25 Cal.4th at p. 642.) Conviction of felony murder in the commission of a burglary or attempted burglary requires proof that the defendant entered the building with the intent to commit a felony or theft. (*Ibid.*)

An attempt to commit a crime occurs when there is a specific intent to commit a crime and a direct but ineffectual act to accomplish its object. (*People v. Smith* (1997) 57 Cal.App.4th 1470, 1481, fn. 7.) The act must be more than mere preparation, it must show that the perpetrator is putting a plan into action. (*People v. Kipp* (1998) 18 Cal.4th 349, 376.) The act need not, however, be the last proximate or ultimate step toward commission of the crime. (*Ibid.*)

Appellant relies on *People v. Marshall* (1997) 15 Cal.4th 1 (*Marshall*) as support for his argument that the evidence here was insufficient to support a finding of the requisite intent to steal. In *Marshall*, the only property that the defendant took from the victim after raping and killing her was a letter from a grocery store responding to a request for a check card. The court concluded that while there was sufficient evidence that the defendant killed the victim with the intent to rape, the evidence did not support a finding that the defendant had killed her with the intent to steal the letter. (*Marshall, supra*, 15 Cal.4th at 34.) Appellant contends that the instant case is analogous, because there was no evidence that he attempted to take any property at all and that he in fact had taken none of the Lunas property. *Marshall* is distinguishable because it did not involve an *attempted* robbery. In an attempted robbery, the act done toward commission of the crime need not be effectual. (*People v. Smith, supra*, 57 Cal.App.4th at 1481, fn. 7.) Thus, the fact that appellant obtained none of the Lunas property before fleeing the scene is of no consequence. Moreover, as discussed below, a rational jury could have inferred from the evidence that appellant had the requisite intent to steal.

A rational jury could have found that appellant and his accomplice, Eduardo Lobeira, entered the Rogers Minimart with the specific intent to rob it or to steal property. The evidence showed that appellant and Lobeira armed themselves before entering the store. Appellant's conduct suggested that he and Lobeira were "casing" the Rogers Minimart before robbing it. Mrs. Luna observed Lobeira enter the store, browse for ten minutes, and exit to confer with appellant. Mrs. Luna then saw Lobeira reenter the store, this time accompanied by appellant, whose right hand was concealed in his pants pocket. Appellant's and Lobeira's conduct caused Mrs. Luna to be both suspicious and fearful, prompting her to telephone her daughter. Mrs. Luna and other witnesses saw appellant flee from the scene after Mr. Luna and Lobeira had been fatally shot. Substantial evidence supports the jury's finding that appellant had the requisite intent to sustain the conviction for burglary and attempted robbery. (*People v. Lewis, supra*, 25 Cal.4th at p. 642.)

Substantial evidence also supports the jury's determination that appellant took direct acts towards the commission of robbery or burglary. Appellant's conduct here went beyond mere preparation. The evidence suggests that when appellant and Lobeira entered the store and approached Mr. Luna, they were putting into action their plan to rob the store. (*See People v. Dillon* (1983) 34 Cal.3d 441, 455-456 [conduct of defendant and his companions in arming themselves, setting off for targeted marijuana farm and then, upon arrival, encircling the field and watching for an opportunity to steal was substantial evidence that defendant accomplished direct but ineffectual acts toward commission of intended robbery].) Appellant's conduct caused Mr. Luna to draw and fire his own gun, indicating that the robbery was already underway when appellant fled the scene. That no witness testified at trial about hearing appellant or Lobeira demand money is not conclusive. (*See People v. Vizcarra* (1980) 110 Cal.App.3d 858, 862 [defendant's conduct in approaching liquor store with rifle and attempting to hide on pathway adjacent to store when observed by customer sufficient evidence to support attempted robbery conviction].) There is no evidence that Mr. Luna fired his weapon without provocation.

Substantial evidence supports the jury's finding that appellant killed Mr. Luna while attempting to rob him, and that Lobeira was also killed in the process. Mrs. Luna saw appellant and Lobeira conversing with her husband, and moments later, she heard gunshots and saw appellant flee. Mr. Luna was found shot in the face, and his own revolver was found near him, with one bullet discharged. Appellant's fingerprint was found on a cassette tape he had asked Mr. Luna to show him immediately before Mr. Luna was shot. Mrs. Luna saw Lobeira fall down on the floor and say "I didn't do anything," before leaving the store. Apart from the Lunas and a female customer, appellant and Lobeira were the only ones in the store at the time of the crimes. A reasonable jury could infer from these facts that appellant and Lobeira were attempting to rob Mr. Luna, causing Mr. Luna to fire his own gun at Lobeira, and that appellant shot and killed Mr. Luna.

Accordingly, Substantial evidence supports the felony murder conviction.

DISPOSITION

The judgment is affirmed.

MOSK, J.

We concur.

GRIGNON, Acting P.J.

ARMSTRONG, J.